IN THE

Supreme Court of the United States

No. 1196.

JOHN A. JOHNSON & SONS, INC., and AMERICAN SURETY COMPANY OF NEW YORK,
Petitioners,

vs.

JACOB FRIEDMAN, Trading as J. FRIEDMAN COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR JACOB FRIEDMAN IN OPPOSITION.

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INDEX.

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Opinions Below.

The opinions of the District Court (R. 167), and of the Circuit Court of Appeals (R. 266), are not as yet officially reported.

Jurisdiction.

The judgments of the District Court in Nos. 1195 and 1196 were entered April 19, 1945 (R. 166). On February 6, 1946 orders were made by the Circuit Court of Appeals for the Fourth Circuit unanimously affirming the judgments of the District Court. The jurisdiction of this Court is invoked under the Act of February 13, 1925.

Statement.

This action, under the Miller Act*, was brought by the Baltimore Brick Company, as a use plaintiff, against John A. Johnson & Sons, Inc., general contractor on a Federal Public Housing Authority project, and American Surety Company of New York, its surety, as defendants. Jacob Friedman, masonry sub-contractor on the project and the respondent here, although not sued, intervened in the litigation in order that the issues raised by the Brick Company be completely adjudicated. By appropriate pleadings, Friedman alleged that he had been advised by Johnson that the brick supplied by the Brick Company did not comply with the specifications and did not meet the sworn warranty of quality made by the Brick Company to Johnson and Friedman; that if it be found that the brick did not comply with the sworn warranty, then the Brick Company was liable to Friedman; that if it be found that the brick did comply, then Johnson and Surety were liable to Friedman; that in any event, Friedman was an innocent party. Friedman's counterclaims as intervenor, therefore, were in the alternative. Judgment was entered in the District Court against Friedman, Johnson and Surety, and a separate judgment was rendered in favor of Friedman against Johnson and Surety, based upon the finding that the brick did comply with the specifications, and that their rejection was wrongful. Friedman joined with Johnson and Surety as appellant in the appeal to the Circuit Court of Appeals and was appellee in Johnson's appeal from the judgment in Friedman's favor.

Friedman has not joined with Johnson and Surety on this petition for a writ of certiorari, so that he appears only in No. 1196, as respondent.

The masonry sub-contract, by reference to the general contract, required *inter alia* that "brick shall be new, com-

*Act of Aug. 24th, 1935, c. 642, 49 stat. 793.

mon brick made from clay or shale and comply with A. S. T. M. specification C62-41T grade MW" (R. 208).

A. S. T. M. specification C62-41T printed at length in the record (R. 48), provided for grades, standards and method of sampling and testing brick, adopted by the American Society for Testing Materials (R. 48).

Friedman, before starting construction, submitted samples of the brick to be supplied by the Brick Company to Johnson, and Johnson submitted the samples to the project engineer, Powell, (R. 184). Powell, in a letter to Johnson dated December 8, 1943, stated (R. 184):

> "In accordance with your letter of December 2, 1943, concerning the sample of concrete units and brick submitted to this office, the same are hereby approved to be according to specification. Kindly furnish manufacturer's certificate of compliance with federal specification as soon as possible."

Powell, later in his testimony, referred to the letter as a "typographical error" (R. 264), but as pointed out by the Circuit Court of Appeals (R. 274), he acknowledged his previous approval on January 22, 1944 (R. 30).

On January 10, 1944 the Brick Company sent the requested warranty (R. 18, 19).

On or about January 15, 1944, Powell became concerned over reports of failure of MW brick on another project in the same area (R. 24). He selected 12 bricks at random from one of 8 or 10 piles on the site (R. 25, 263), which were sent to the Bureau of Standards for testing and analysis. The selection was made "from a pile that had been lying out in freezing winter weather for a considerable period of time, with many surfaces exposed that would not have been so exposed after being put in place in the buildings" (R. 270). All of the samples met the requirements of the A. S. T. M. test, except 3,

which fell somewhat short of the minimum compressive strength requirement of 2,200 lbs. per square inch (R. 91).

On January 22, 1944 the F. P. H. A. notified Johnson that the brick supplied by the Brick Company were condemned (R. 30). Johnson advised Friedman of this action (185, 186), and Friedman passed this information on to the Brick Company (R. 66, 129). The latter disclaimed responsibility (R. 78).

The method of sampling and testing set forth in A. S. T. M. specification C62-41T was as follows (R. 52):

> "Sampling and Testing:
>
> 5. (a) For purpose of tests, brick that are representative of the commercial product shall be selected by a competent person appointed by the purchaser, the place or places of selection to be designated when the purchase order is placed. The manufacturer or the seller shall furnish specimens for tests without charge."

The Circuit Court of Appeals referring to that specification, and to the test which had been conducted, said (R. 270):

> "* * * Notwithstanding this provision, the purchaser, the government, and the manufacturer, as well as Friedman, saw fit to proceed otherwise and the only test made for the purpose of determining the quality of the brick and whether they complied with the A. S. T. M. requirements was made not with brick selected by a competent person appointed by the purchaser, nor with brick selected at the place or places designated when the purchase order was placed, as provided in the above quoted provision, but with brick selected by the Project Engineer, the representative of the government, which brick

were selected by him from places chosen by him not when the purchase order was placed, but on January 15, as the Project Engineer testified, which was more than a month after the purchase order was placed and after the selected brick had lain exposed to winter weather with alternate freezing and thawing for at least twenty days and probably longer."

Powell condemned not only the bricks on the exposed pile, but all the brick which the FPHA had previously approved, in other words, all MW brick supplied by the Brick Company. The condemnation, however, was limited to the use of bricks on exposed faces, and the bricks supplied were authorized for use and continued to be used for backing up and for interior faces of walls (R. 187, 188).

Both the District Court and the Circuit Court of Appeals found that the brick did comply with the specifications, that Friedman in respect of the brick did comply with his contract with Johnson, and that "the condemnation and rejection of the brick by the Project Engineer was wrongful and in violation of Friedman's rights" (R. 273).

Questions Presented.

The fundamental question raised by the petitioner is whether, in a contract for construction of a public work, a subcontractor is conclusively bound by a decision of the project engineer, where the decision was made in violation of an express contract provision.

Also raised collaterally is the question whether the government's right to condem allegedly defective materials may be enlarged to permit rejection of all materials of the same kind when the rejection was on the basis of inferior samples selected in violation of an express contract provision designating a method of selection.

Argument.

The petitioner urges two contentions not presented or assigned as error below, and which it, therefore raises for the first time in this Court. These matters need not be considered here.

> *Owens* v. *Union Pacific Railway Co.*, 319 U. S. 715, 724;
> *Sonzinsky* v. *U. S.*, 300 U. S. 506;
> *Burnet* v. *Commonwealth Imp. Co.*, 287 U. S. 415, 418.

The first such contention erroneously assumes that the Brick Company was permitted to recover for brick condemned and rejected by the government and not used in construction. The record shows that the Brick Company delivered brick to the site of the value of $16,402.40, and received payment of $10,747.20 (R. 12). The value of bricks actually removed from the wall upon the direction of the project engineer was only $95.85 (R. 197). The bricks remaining on the site were authorized for use by the F. P. H. A. for backing up and for interior masonry and *were actually used for that purpose* (R. 187-189). The action, therefore, was clearly one for goods sold and delivered and came within the provisions of the Miller Act.

The second contention is that the government's own specification in its contract with Johnson was not fully binding upon it, and not, therefore, binding upon Johnson. In short, the petitioner argues that the portion of the specifications relating to method of sampling and testing refer to selection of samples by purchaser's representative, and that since the government is not a "purchaser" it is not bound. This tenuous position requires a forced reading of the contract, to permit escape from the provision of the contract inserted by the government

itself. As the Circuit Court of Appeals said, the government, as owner, and Johnson, as general contractor, were fully bound by the specifications and were required to do their part under the specification or run the resultant risk (R. 275).

Here the mode and method of conducting the test were specified. The use of some other method can not be relied upon to establish a breach of contract.

> *Continental and Commercial Trust* v. *Corey Bros.*, 208 Fed. 976;
> *Economy Trust* v. *Raymond Concrete Pile Co.*, 111 Fed (2nd) 875;
> *The Isaac Newton*, Fed. Cas. No. 7089 Abb. Adm. 11.

Friedman, as subcontractor, was entitled to rely upon the plans and specifications, *Christie* v. *U. S.*, 237 U. S. 234 (1914), and not to assume the risk of a test on samples taken without notice, under conditions which "may have altered very materially the condition of brick * * *" (R. 28, 272).

The remaining contentions in petitioner's brief, all of which have been rejected by both Courts below, relate to various provisions of the prolix contract documents, and fall into two categories;

First: The provisions in the masonry subcontract governing and limiting Friedman's right to recover for "extra work" (R. 213). This controversy did not involve extra work or work outside the contract, but rather improper rejection of materials supplied. Friedman's workmanship was not questioned. The learned District Judge held (R. 173):

> "* * * It may be said here * * * that we do not consider they (the above provisions) have any application to the present controversy because they

> clearly appear to relate to extra work, that is, work not within the express or reasonably implied scope of the specifications, agreed upon at the time that the two contracts were made."

This holding was expressly affirmed by the Circuit Court of Appeals (R. 279).

SECOND: The provisions of the general contract and the masonry subcontract, which petitioner argues bind Friedman to abide by all rulings of the owner, the F. P. H. A., just as Johnson is bound, the F.P.H.A. having power to made "conclusive decisions" on all disputed questions of fact (R. 225-235, 208-224).

These arguments proceed on the assumption that the bricks delivered were defective and disregard the successive findings of fact of the Court below. The Circuit Court of Appeals said (R. 272, 273):

> "• • • The District Court held in each controversy that there was no breach of warranty. We approve this holding, which is equivalent to a finding that the Baltimore Brick Company brick measured up to the specifications, that Friedman in this respect complied with his contract with Johnson, and that, therefore, the condemnation and rejection by the Project Engineer and the instruction of Johnson to Friedman based thereon was wrongful and in violation of Friedman's rights."

These findings were fully supported by the evidence. No substantial reason has been advanced for disturbing them.

In *Virginian Railway* v. *Federal*, 300 U. S. 515, 542, this Court said:

> "The concurrent findings of fact of the two Courts below are not shown to be clearly erroneous or unsupported by the evidence. We, accordingly, accept them as the conclusive basis for decision."

See also

Mahneck v. *Southern S. S. Co.*, 321 U. S. 96, 98;
Goodyear v. *Ray-O-Vac*, 321 U. S. 275, 278;
Anderson v. *Abbott*, 321 U. S. 329, 356.

The finality of the government's decision depends upon the government's performance and cannot be based upon a breach of the contract. The decision of the contracting officer, or as here, the project engineer, is not conclusive if based upon a change or misinterpretation of the contract.

Dock Contractor Co. v. *City of New York*, 296 Fed. 377 (CCA 2) 1921;
Helvetia Milk Condensing Co. v. *United States*, 56 Fed. (2nd) 676, 74 C. Cl. 740;
Tomlinson v. *Ashland County*, 170 Wisc. 58.

This is not to say that the contracting officer cannot reject material if it is in fact defective. The decision is only that the right of absolute rejection—rejection regardless of fact—does not exist when the contract which gives that power has not been performed in that respect. The project engineer, in the exercise of honest judgment, could have rejected the brick in the exposed pile or could have rejected masonry in place, but he could not on the basis of a test conducted in violation of contract condemn *all* previously approved materials.

Nothing in *United States* v. *Madsen Construction Co.*, 139 Fed. (2nd) 613, conflicts with this decision. The question here presented is "quite distinct from mere questions of fact relating to the prosecution of the work, regarding which discretion is vested in the plant engineer" (R. 181).

It should be observed that the District Judge below, sitting as a jury, also found as a fact that the government's specifications were in error in requiring grade

MW brick, an inferior grade of brick, in the exterior work, "and upon recognizing its error, which it did not do until the masonry work was well advanced, it then attempted to cover up its error by relying upon its right to reject any and all materials under the contract" (R. 183). This conclusion finds full support in the record. The A.S.T.M. specification itself indicated the undesirability of the brick for exposed masonry surfaces (R. 57), and, to repeat, the project engineer, after the Bureau of Standards' test, sanctioned and approved the use of the "condemned" brick for backing up and for interior masonry, where it was not exposed to the weather (R. 187, 188).

Friedman is an innocent party in this controversy. He ordered the brick from the only local plant supplying the grade specified. His workmanship was not questioned. Upon the institution of suit, he intervened promptly to the end that his rights could be determined as against the Brick Company, and Johnson, the general contractor. He has no direct remedy against the government arising out of violation of the specifications, but is limited in remedy to Johnson. Johnson is the only party who can pursue a remedy against the government arising out of the breach here found.

CONCLUSION.

The decision below is correct, and there exists no conflict. It is respectfully submitted that the petition for a writ of certiorari be denied.

HOWARD HENIG,
Counsel for Respondent.

May, 1946.